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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 288

JAMES JOINER,

Petitioner,

vs.

ROSETTA DECKARD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR REHEARING

JOHN R. SNIVELY,
401 West State Street,
Rockford, Illinois 61101,
Counsel for Petitioner.

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes James Joiner, the petitioner herein, and presents his petition for rehearing in the above entitled cause, upon the grounds, and for the reasons hereinafter set forth:

1. The practice and procedure following the apprehension of the accused is jurisdictional.

A proceeding to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare may be instituted in a court having jurisdiction of certain cases. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 54.) Such action may be instituted only on the filing of a complaint in writing by the mother of a child born out of wedlock, or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing, under oath or affirmation, a person with being the father of such child. The several State's Attorneys within their respective counties shall, upon the request of such woman, file the complaint on her behalf and proceed forthwith in the enforcement of the Act.

Upon the filing of a complaint * * *, under oath or affirmation, the court shall thereupon issue a warrant for the apprehension of the defendant, * * * which may be served * * * in any county. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 55.) Upon the appearance of the accused and in his presence, the Court shall examine the woman, upon oath or affirmation, on the charge that he is the father of the child. The accused shall have the right to controvert the charge, and evidence may be heard as in other cases within the jurisdiction of the Court. If the court is of the opinion that no sufficient cause is established it shall dismiss the complaint and discharge the accused. The accused shall have the right to submit to a blood test. If the accused so submits himself, the court shall order such test administered. If the blood test shows that the accused is not the father of the child as alleged in the complaint, the accused shall be discharged forthwith by the court. If the accused admits the charge, or waives examination of the complainant, or

if after the accused has controverted the charge, the court, upon examination, determines that sufficient cause appears, it shall bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint. * * *

In an order filed on February 3, 1962, the trial court authorized the sheriff to take the defendant into custody and bring him before the court forthwith. R.C5. A capias was issued. R.C7. He was arrested on March 26, 1962.

The record discloses that the trial court failed to follow the practice and procedure set forth in the Act.

First, the defendant was first brought before the trial court on March 27, 1962, but upon his appearance the court did not examine the woman, upon oath or affirmation, on the charge that he was the father of the child.

Second, the accused did not have an opportunity to controvert the charge, nor was he advised of his right to do so.

Third, he did not have an opportunity to submit to a blood test, nor was he advised of his right to do so.

Fourth, he was not advised relative to the acknowledgment of paternity submitted to him and the effect thereof.

Fifth, evidence was not heard by the trial court.

Sixth, the trial court did not bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned.

The practice and procedure was not in accordance with the provisions of the Act. Clearly, the trial court lacked jurisdiction to proceed with the proceeding. The failure of the trial court to follow the practice and procedure is a jurisdictional defect. (*Brown* v. *Box*, 38 Ill. 2d 80, 230 N.E. 2d 204 (1967), *Alsen* v. *Stoner*, 114 Ill. App. 2d 216, 252 N.E. 2d 488, 493 (1969).)

2. There was a substantial denial of the constitutional rights of the petitioner.

First, he was not warned of his absolute right to remain silent. He was not warned that anything that he said would and could be used against him in court. He was not advised of his right to the assistance of counsel. (*Brown* v. *Box*, 38 Ill. 2d 80, 230 N.E. 2d 204 (1967).). He was not advised that if he is not able to employ counsel, the court will appoint counsel for him. He did not understandingly waive his right to remain silent or to counsel. He was deprived of his right to counsel.

Second, he did not understand the nature and cause of the accusation against him. He was in ignorance of his rights and of the consequences of his acts.

Third, he did not understandingly waive examination of the woman or his right to controvert the charge. He did not understandingly waive his right to a blood test.

Fourth, he was not furnished with a copy of the amended complaint nor was it read to him.

Fifth, the case was not at issue. He had a right to file an answer to the amended complaint. He was not ruled to answer the complaint. There was no entry of an order of default. The trial court had no right to proceed.

Sixth, he was not advised of his right to a trial by jury. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 56.) He did not understandingly waive his right to a trial by jury.

Seventh, he was not advised relative to an acknowledgment of paternity and the effect thereof.

It was the duty of the trial court to admonish the petitioner as to the nature of the charge against him, and the consequences thereof and his right to counsel and a trial by jury. (*People ex rel. Adams* v. *Sanes*, 41 Ill. 2d 381, 385, 243 N.E. 2d 233 (1968), *Alsen* v. *Stoner*, 114 Ill. App. 2d 216, 252 N.E. 2d 488 (1969).) Clearly, grave questions are raised relative to the fundamental fairness of the proceeding.

It is submitted that there was a flagrant denial of due process of law.

3. The purported judgment that the defendant is the father of the child is void.

If the defendant has acknowledged that he is the father of the child, either at the preliminary hearing * * * or at the subsequent trial of the issue, which acknowledgment he has not repudiated at the trial of the issue, or if on the trial of the issue the court or jury as the case may be, finds that he is the father, the court shall enter judgment to that effect. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 59.)

The record fails to disclose that there was a preliminary hearing or a subsequent trial of the issue. It does, however, disclose that the defendant filed a repudiation of the purported acknowledgment of paternity filed on March 27, 1962. R.C31. In a motion filed on the same day, he moved to vacate the purported acknowledgment of paternity because he had repudiated the same. R.C12. It was denied.

The statute is mandatory. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 59.) The trial court must enter judgment.

As shown in *DiBella* v. *Cuccio,* 15 Ill. 2d 580 (1959), and *Alsen* v. *Stoner,* 114 Ill. App. 2d 216, 252 N.E. 2d 488 (1969), the trial court entered judgment finding the defendant to be the father of the child. They acted in compliance with the statute, as the trial court should have done in this case.

Here, the judgment was not entered. The trial court failed to comply with the statute. A void judgment is always subject to attack.

The judgment of the court below must be vacated and the cause remanded.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the petitioner prays that this Court grant a rehearing of the order of denial entered on December 7, 1970, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 (2).

JOHN R. SNIVELY,
Counsel for Petitioner.